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JUN 13 1973

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5026

CLOVIS PATTERSON,

Appellant,

—v.—

SEWARD WARREN, ETC., ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW MEXICO

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5830

CLOVER PATTERSON,

Appellant,

—v.—

GEORGE WARNER, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

Civil Action No. 69-232 CH

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated

v.

GEORGE WARNER, Individually and in this official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation

DOCKET ENTRIES

1969		
Nov.	7	Order granting leave to file without prepayment of costs
	7	Filed Complaint
	7	Issued summons and 6 copies (Ret. 20 days)
	7	Filed Petition to proceed wtihout prepayment of costs
	7	Filed affidavit in forma pauperis
Nov.	14	Filed Marshal's return on summons (served on Governor of W. Va., Atty. General of W. Va. & Warner, J. P.
	14	Filed Marshal's return on summons (served on State Auditor)
Dec.	1	Filed Notice of Motion, with motion attached for summary judgment, by counsel for defendant George Warner, Justice of Peace
	1	Filed Notice of Motion, with motion attached for stay and/or continuance, by counsel for defendant George Warner, Justice of Peace
	1	Filed Answer of defendant, Graham Motor Company, a corporation

DOCKET ENTRIES

1969

Dec. 11 Filed Plaintiffs' Application for convening of a three judge court

11 Filed Notice of Motion, certificate of service, and Motion for Stay of Execution of Judgment attached

11 Received brief in opposition to defendants motions for summary judgment and for a continuance or a stay

Dec. 30 Order deferring defendant's motions for summary judgment and for continuance and/or stay until convening of a three-judge court; plaintiffs' motion for temporary restraining order granted as to plaintiff, Clover Patterson only; defendant, George Warner, Justice of Peace, etc., is hereby enjoined from issuing execution of process pursuant to judgment against plaintiff in civil suit of Graham Motor Company v. Patterson, decided 10/23/69, until such time as case is decided on the merits; and further ordered that a three-judge court be convened

1970

Jan. 2 Order of Chief Judge of Fourth Judicial Circuit designating Honorable Herbert S. Boreman and Honorable Sidney L. Christie to serve with John A. Field, Jr. in determination of this action

2 Filed request of Honorable John A. Field, Jr. for designation of a three-judge court

Mar. 10 Order filing defendant, George Warner's answer and defendant's motions for summary judgment and for continuance and/or stay to be considered by court in its final decision

10 Filed Answer of defendant George Warner, individually and in his official capacity as Justice of Peace, with certificate of service

Nov. 24 Received plaintiff's memorandum in support of request for declaratory and injunctive relief

DOCKET ENTRIES

1970		
Dec.	17	Received memorandum in support of plaintiff's request for declaratory and injunctive relief
Dec.	31	Received Defendant's Memorandum in support of motion for summary judgment etc.
1971		
July	27	Filed plaintiffs' motion for consolidation for joint hearing, with certificate of service attached (with CA 71-85)
Aug.	5	Received Supplemental Memorandum in Support of Plaintiff's Request for Declaratory and Injunctive Relief
Aug.	20	Filed defendant's memorandum in opposition to plaintiff's supplemental memorandum in support of request for declaratory and injunctive relief
Dec.	16	Order, amending original designation of three judge court and designating John A. Field, Jr., U. S. Circuit Judge, Sidney L. Christie, U. S. District Judge and Dennis R. Knapp, U. S. District Judge
1972		
Feb.	8	Filed Court Reporter's Shorthand notes of proceedings 12/15/69
July	3	Received Defendant's Supplemental Brief
Sept.	13	Filed Court's opinion dated 8/25/72
	13	Order, by 3 judge Court that Chapter 50, Article 15, Section 2 of W. Va. Code found to be constitutional; denying relief sought by pltf; case retired from docket of Court
Oct.	13	Filed plaintiff's Motion to Appeal in Forma Pauperis
	13	Filed plaintiff's Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis
	13	ORDER, Permitting pltf to file notice of appeal in forma pauperis
	13	Filed notice of appeal

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 69-232

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

ORDER GRANTING LEAVE TO FILE WITHOUT PREPAYMENT OF COSTS—Entered November 7, 1969

Upon consideration of the motion of counsel for plaintiffs and of the affidavit of said plaintiffs, and it appearing therefrom that said plaintiffs are unable to pay the costs of filing and proceeding with this action for declaratory judgment, temporary and permanent injunctive relief to prevent the above styled defendants from enforcing certain statutes and administrative regulations on the grounds that said statutes and regulations are unconstitutional, and it further appearing that plaintiffs believe that they are entitled to the relief they seek; it is this 7th day of November, 1969,

ORDERED:

(1) That the plaintiffs be, and they are hereby granted leave to file and to prosecute this action without prepayment of costs, and

(2) That the Clerk of this Court shall permit the filing of this action without assessment of costs, and

(3) That the Clerk of this Court, upon filing of the complaint in this action, shall forthwith issue a summons and a copy of the complaint as provided by plaintiffs to the marshal for service upon each of the defendants and

shall issue to said marshall a copy of the complaint to be delivered to the Attorney General of the State of West Virginia, without requiring the prepayment of costs; and

(4) That the United States Marshal by his deputy, shall, upon receipt of summons and complaint, serve said summons and complaint to each of the persons made defendant in this action and deliver to the Attorney General a copy of said complaint without requiring the prepayment of costs, and

(5) That the Clerk of this Court file all other motions, affidavits or other papers required by the Court or by the Federal Rules of Civil Procedure and direct the United States Marshal to serve such papers as are required to be served by the Federal Rules of Civil Procedure without prepayment of costs.

(6) That all copies of necessary papers for the above styled action be served upon the Governor of West Virginia as required by 28 U.S.C. Sec. 2284 (2).

/s/ John A. Field, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

C.A. 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

v.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

I

COMPLAINT—Filed November 7, 1969

Plaintiffs allege as follows:

1. The jurisdiction and authority of this Court are invoked under Title 28 U.S.C. § 1343(3) and (4), 2201 and 2202 and Title 42 U.S.C. § 1981, 1983 and 1988, to obtain declaratory judgment and injunctive relief. Plaintiff contends that West Virginia Code § 50-15-2 is unconstitutional in that it denies access to an appeal from a judgment for monies owing on a contract to those financially unable to post a bond with surety, thus creating an invidious discrimination against the plaintiff and others similarly situated on the basis of wealth, in violation of the equal protection clause of the Fourteenth Amendment.

2. This is an action for declaratory judgment, and a preliminary and permanent injunction to enjoin the unconstitutional denials of appeal from judgments for monies owing on a contract solely on the ground that the appellant is financially unable to post a bond with surety pursuant to West Virginia Code § 50-15-2.

3. This is a proper action for the convening of a three judge court pursuant to Title 28 U.S.C. §§ 2281 and 2284 in that this action directly challenges the constitutionality of the enforcement, execution and operation of a state statute.

4. Plaintiff, Clover Patterson, is a citizen of the United States and a resident of West Dunbar, West Virginia. Mr. Patterson is a welfare recipient currently undergoing training under the Work Incentive Program.

5. Defendant, George Warner, is a Justice of the Peace of Kanawha County, West Virginia, with his place of business located in Charleston, West Virginia.

6. Defendant, Graham Motor Company, is a corporation chartered under the laws of the State of West Virginia and during the course of business sold an automobile to plaintiff at 2 Newhouse Drive, Charleston, West Virginia.

II

Statement of the Claim

1. On or about November 14, 1968, defendant Graham Motor Company and plaintiff entered into an agreement, hereinafter referred to as "agreement", whereby plaintiff was to purchase a used 1959 Dodge station wagon.

2. Pursuant to this agreement, the balance payable was evidenced by a negotiable promissory note, hereinafter referred to as the "note", executed by the plaintiff contemporaneous with the execution of the agreement.

3. Delivery of the automobile was made on November 14, 1968.

4. Following delivery, the above-mentioned automobile repeatedly and continuously was in need of repair, which repair the plaintiff requested continuously from defendant Graham Motor Company and which requests were continuously denied after the first time.

5. As a result, plaintiff repudiated the "agreement" and ceased payment, pursuant to West Virginia Code § 46-2-602.

6. Nevertheless, on October 23, 1969, plaintiff appeared before Justice of the Peace George Warner to answer an

action for monies owing on a contract instituted by Graham Motor Company.

7. Despite the defenses of breach of warranty, failure of consideration, fraud, rightful repudiation and several others, judgment was granted to Graham Motor Company in the amount of $300 plus costs.

8. An appeal from the judgment of Justice of the Peace George Warner was requested by the plaintiff. The surety bond was set at $600 by defendant Warner pursuant to West Virginia Code § 50-15-2 which section requires such bond as a condition to appeal. Plaintiff was denied any forma pauperis relief or waiver of the bond requirement because of his poverty, nor is any such relief available to plaintiff under West Virginia law.

9. Plaintiff cannot, nor will he be able to find the necessary $600 himself, nor the $36 required by the several bonding companies located in Charleston, West Virginia. In addition, plaintiff does not own, in fee simple, any real property.

10. As a result, plaintiff has had judgment entered against him in the amount of $300 plus costs.

11. The appeal which plaintiff requested is not for the purpose of delay or to obstruct the summary process proceeding but is supported by bona fide defenses. (See attorney's affidavit attached hereto.)

III

Causes of Action

1. West Virginia Code § 50-15-2 provides, in relevant part, a qualified right of appeal from a judgment from monies owing on a contract.

> The appeal shall not be granted by the justice unless, within ten days after the judgment is rendered . . . bond with good security, to be approved by the justice in a penalty double the amount of the judgment . . . is filed with him, with condition to the effect that the person proposing to appeal will perform and satisfy any judgment which may be rendered against him on such appeal . . .

2. The plaintiff herein constitutes a family of low income and he is unable to raise the necessary funds to obtain the aforesaid bond and the sole reason why plaintiff did not supply the bond was that he is indigent and in a state of poverty and was, and is, unable to raise the necessary funds.

3. West Virigina Code § 50-15-2 which denies the opportunity for an appeal to those financially unable to post a bond with surety constitutes an invidious discrimination against the plaintiff herein on the basis of wealth and, thus, violates the due process and equal protection clauses of the Fourteenth Amendment.

4. West Virginia Code § 50-15-2, which denies the opportunity for an appeal to those financially unable to post a bond with surety constitutes a violation of plaintiffs' First Amendment right to petition the government for redress of grievances.

WHEREFORE, the plaintiff requests:

1. That a three-judge district court be convened under 28 U.S.C. 2284 to hear this action.

2. That the defendant, George Warner, Justice of the Peace, or any other Justice of the Peace of the State of West Virginia, be enjoined both during the pendency of this action and permanently from issuing any execution upon the judgment of monies due upon a contract obtained by the defendant Graham Motor Company in the case of Graham Motor Company vs. Patterson, decided October 23, 1969, until such time as there is a final determination of the case on appeal.

3. That the defendant Graham Motor Company, its agents, servants, employees and attorneys, or any of them, be enjoined during the pendency of this action and permanently from seeking or obtaining by whatever means, an execution upon the judgment of monies due upon a contract rendered in their favor in the case of Graham Motor Company vs. Patterson, decided October 23, 1969, until such time as there is final determination of the case on appeal.

4. That the time for an appeal by plaintiff Mr. Patterson in the case of Graham Motor Company vs. Patterson, decided October 23, 1969, be tolled.

5. That a declaratory judgment be given, declaring that portions of West Virginia Code § 50-15-2 relating to posting of a surety bond upon appeal is unconstitutional on its face and as applied to plaintiff herein.

6. That plaintiff be granted such other relief as may be appropriate.

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated

By Counsel

/s/ John L. Boettner, Jr.
Legal Aid Society of Charleston
1026 Quarrier Street
Charleston, West Virginia
Counsel for Plaintiffs

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-Wit:

CLOVER PATTERSON, the plaintiff named in the foregoing Complaint, after being first duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be on information, and that insofar as they are therein stated to be on information, he believes them to be true.

/s/ Clover Patterson
CLOVER PATTERSON

Taken, sworn to and subscribed before me this 7th day of November, 1969.

My commission expires June 29, 1975.

/s/ Greta S. Hicks
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

v.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

AFFIDAVIT

My name is Clover Patterson and I am 34 years old. I am the father of 5 children ages 15, 13, 3, 2 and 9 months. I am a welfare recipient currently enrolled in the W.I.N. program. My address is P. O. Box 155, West Dunbar, West Virginia.

On November 14, 1968, I bought a used Dodge station wagon from Graham Motor Company. I signed a note to pay it off. I was told that the car was in good condition, but from the day I bought it, it kept on breaking down. I asked Graham Motor Company to fix it, but they refused after the first time. I was willing, and offered to return the car if I could get my money back, but Graham Motor Company refused.

I received a summons on or about the 1st day of October, 1969 to come to Justice of the Peace George Warner's court to answer a suit for nonpayment of the note since March.

On October 23, 1969, I went to see the J. P. He told me and Mr. Charles Lorber, a Legal Aid representative, that a contract was a contract and that was that. Mr. Lorber and I tried to explain to him that the car was no

good, and Mr. Lorber made some other arguments to him but he still said I owed $300 to Graham. After the hearing, Mr. Lorber said that I should appeal the case and to speak to Mr. Boettner, a Legal Aid lawyer about it. Mr. Boettner told me I had some good defenses. He said that the J. P. required a $600 Bond to appeal the case.

I told him I could not find that kind of money since I was on welfare. If I couldn't find it, I couldn't appeal or do anything else.

/s/ Clover Patterson
CLOVER PATTERSON

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-Wit:

I, Constance Ann Harper, a Notary Public in and for the County and State aforesaid, do hereby certify that CLOVER PATTERSON, whose name is signed to the foregoing Affidavit has this day acknowledged the same before me in my said County.

Given under my hand this 5th day of November, 1969.
My commission expires May 21, 1972.

/s/ Constance Ann Harper
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

AFFIDAVIT

My name is John Boettner, Jr., a Staff Attorney at Charleston Legal Aid Society, 1026 Quarrier Street, Charleston, West Virginia. I am a member of the West Virginia State Bar. I believe Clover Patterson have several valid defenses among which are failure of consideration and fraud.

/s/ John Boettner, Jr.
JOHN BOETTNER, JR.

Taken, sworn to and subscribed before me this 6th day of November, 1969.
My commission expires December 1, 1976.

/s/ Olga Williams
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 69-232

[Filed Nov. 7, 1969, Clerk's Office, U. S. Dist. Court, So. Dist. W. Va., Virgil F. Frizzell, Clerk]

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

AFFIDAVIT IN FORMA PAUPERIS

Clover Patterson, being first duly sworn on oath depose and say that he is a citizen of the United States; that he is the person named as plaintiff in the above entitled cause of action wherein the above named persons are the parties defendant; that they have personal knowledge of the facts herein stated.

That he is wholly without funds to pay the costs of the filing of this suit or to give security for the same; that he is unemployed and has no earnings of any kind; that he has no property either real or personal, from which he might obtain the necessary funds; that said suit is for temporary and permanent injunctive relief to enjoin the above styled defendants from executing judgment on plaintiff and for a declaration that said plaintiff may proceed with his appeal in the case of Graham Motor Company vs. Patterson informa pauperis rather than being required to post a bond as per West Virginia Code, 50-15-2.

/s/ Clover Patterson
CLOVER PATTERSON

Taken, sworn to and subscribed before me this 5 day of November, 1969.

My commission expires December 1, 1976.

/s/ Olga Williams
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action File No. CH 69-232

[Filed, Dec. 1, 1967, Clerk's Office, U. S. Dist. Court, So. Dist., W. Va., Virgil F. Frizzell, Clerk]

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

NOTICE OF MOTION

TO: John L. Boettner, Jr.
Charleston Legal Aid Society
1026 Quarrier Street
Charleston, West Virginia

Graham Motor Company
2 Newhouse Drive
Charleston, West Virginia

Your are hereby notified that the undersigned defendant, George Warner, Justice of the Peace of Kanawha County, Louden District, West Virginia, through his counsel, Cletus B. Hanley, Deputy Attorney General, and James G. Anderson, Assistant Attorney General, will present his motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in his favor upon all in Civil Action File No. CH 69-232.

You are further notified that counsel for defendant, George Warner, Justice of the Peace of Kanawha County, Louden District, West Virginia, will present said motion on the 15th day of December, 1969, at ten-thirty o'clock a.m., E.S.T., or as soon thereafter as counsel can be heard which will be convenient for the Court.

GEORGE WARNER, Justice of the Peace of Kanawha County, Louden District, West Virginia,

By Counsel

/s/ Cletus B. Hanley
CLETUS B. HANLEY
Deputy Attorney General
Office of the Attorney General
Charleston, West Virginia

/s/ James G. Anderson
JAMES G. ANDERSON
Assistant Attorney General
Office of the Attorney General
Charleston, West Virginia

Counsel for Defendant

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action File No. CH 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

MOTION FOR SUMMARY JUDGMENT

Defendant moves the Court as follows:

That it enter pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in defendant's favor against the plaintiffs for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law in that Chapter 50, Article 15, Section 2, of the West Virginia Code of 1931, as amended, is not in violation of the plaintiffs' rights under the First and Fourteenth Amendment of the United States Constitution.

This motion filed this 28th day of November, 1969.

GEORGE WARNER, Justice of the Peace of Kanawha County, Louden District, West Virginia
By Counsel

/s/ Cletus B. Hanley
Deputy Attorney General

/s/ James G. Anderson
Assistant Attorney General
Counsel for Defendant

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action File No. CH 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

NOTICE OF MOTION—Filed December 1, 1969

TO: John L. Boettner, Jr.
Charleston Legal Aid Society
1026 Quarrier Street
Charleston, West Virginia

Graham Motor Company
2 Newhouse Drive
Charleston, West Virginia

You are hereby notified that the undersigned defendant, George Warner, Justice of the Peace of Kanawha County, Louden District, West Virginia, through his counsel, Cletus B. Hanley, Deputy Attorney General, and James G. Anderson, Assistant Attorney General, will present his motion for stay and/or continuance in Civil Action No. CH 69-232.

You are further notified that counsel for defendant, George Warner, Justice of the Peace of Kanawha County, Louden District, West Virginia, will present said motion

on the 15th day of December, 1969, at ten-thirty o'clock a.m., E.S.T., or as soon thereafter as counsel can be heard which will be convenient for the Court.

GEORGE WARNER, Justice of the Peace of Kanawha County, Louden District, West Virginia

By Counsel

/s/ Cletus B. Hanley
Deputy Attorney General
Office of the Attorney General
Charleston, West Virginia

/s/ James G. Anderson
Assistant Attorney General
Office of the Attorney General
Charleston, West Virginia
Counsel for Defendant

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action File No. CH 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

MOTION FOR STAY AND/OR CONTINUANCE—
Filed December 1, 1969

Two cases have been docketed in the United States Supreme Court where it is highly probable that jurisdiction will be noted as a matter of right. *Boddie* v. *Connecticut* (DC Conn.). Dkt. 265. Leave to proceed in forma pauperis granted, probable jurisdiction noted, and case placed on summary calendar, June 23, 1969. *Frederick* v. *Schwartz* (DC Conn.). Dkt. 365 (Misc.). Jurisdictional statement filed as an appeal in forma pauperis, June 25, 1969. 2 Poverty Law Reporter, 10,011 and 10,012.

Defendant, therefore, moves this Court at its discretion to abstain from making its findings in this case until the United States Supreme Court has ruled on this issue.

Defendant recognizes that the doctrine of abstention does not apply strictly to this action since these particular plaintiffs have not instituted a similar action in another federal court.

However, it is felt that the situation existing between this case and those before the United States Supreme Court are analogous basically to the facts and issue and, therefore, defendant moves this Court to stay or continue this matter at its discretion in order to await the outcome of those cases which are now pending before the United States Supreme Court.

This motion filed this 28th day of November, 1969.

GEORGE WARNER, Justice of the Peace of Kanawha County, Louden District, West Virginia

By Counsel

/s/ Cletus B. Hanley
Deputy Attorney General

/s/ James G. Anderson
Assistant Attorney General
Counsel for Defendant

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action No. CH 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

ANSWER OF GRAHAM MOTOR COMPANY—
Filed December 1, 1969

1. Defendant, Graham Motor Company, neither admits nor denies the allegations contained in Paragraph One of plaintiffs' complaint as such are legal determinations to be made by the proper authority.

2. This defendant denies that there has been any unconstitutional denial of appeal.

3. Defendant denies the allegations contained in Paragraph Three of plaintiffs' complaint.

4. On information and belief, defendant admits that the plaintiff, Clover Patterson, is a citizen and resident of West Dunbar, West Virginia. Defendant is without knowledge or information regarding the other allegations contained in Paragraph Four of Plaintiffs' complaint.

5. Defendant, Graham Motor Company, admits the allegations contained in Paragraphs Five and Six of plaintiffs' complaint.

II.

Answer of Graham Motor Company to Statement of the Claim

1. Defendant, Graham Motor Company, admits the allegations contained in Paragraphs One, Two and Three.
2. This defendant denies the allegations contained in Paragraphs Four and Five.
3. Defendant admits the allegations contained in Paragraph Six.
4. Defendant admits that judgment was granted to Graham Motor Company in the amount of $300.00 plus costs but denies the other allegations contained in Paragraph Seven.
5. Defendant is without information and knowledge sufficient to form a belief as to the truth of the averments contained in Paragraphs Eight and Nine.
6. Defendant admits the allegations contained in Paragraphs Ten and Eleven.

III.

Answer of Graham Motor Company to Causes of Action

1. Defendant, Graham Motor Company, admits the allegations contained in Paragraph One.
2. Defendant, Graham Motor Company, is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph Two.

3. Defendant denies the allegations contained in Paragraph Three and Fou·

WHEREFORE, defendant, Graham Motor Company, requests that this action be dismissed and that he be awarded his reasonable costs incurred herein.

GRAHAM MOTOR COMPANY,
a Corporation

By Counsel

/s/ Dean Lewis
Counsel for Graham Motor
1500 Kanawha Boulevard, East
Charleston, West Virginia 25311

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action No. CH 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

MOTION FOR STAY OF EXECUTION OF JUDGMENT

The plaintiff prays that the defendant, George Warner, Justice of the Peace, and any other Justice of the Peace of the State of West Virginia, be enjoined both during the pendency of this action and permanently from issuing any execution upon the judgment of monies due upon a contract obtained by the defendant, Graham Motor Company in the case of Graham Motor Company vs. Patterson, decided October 23, 1969, until such time as there is a final determination of the case on appeal.

I, John L. Boettner, Jr., counsel for plaintiffs, do hereby certify that a true copy of the foregoing Motion was served upon the counsel for Defendants by depositing

said copy in the United States Mail, first class postage prepaid, addressed as follows:

Dean Lewis, Esquire
1500 Kanawha Boulevard, East
Charleston, West Virginia 25311

Cletus B. Hanley, Esquire
Deputy Attorney General
Office of the Attorney General
Charleston, West Virginia

James G. Anderson, Esquire
Assistant Attorney General
Office of the Attorney General
Charleston, West Virginia

DATED: Dec. 11, 1969

/s/ John L. Boettner, Jr.

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. CH 69-232

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

v.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

ORDER—March 10, 1970

On the 10th day of March, 1970, came the defendant, George Warner, by his attorney James G. Anderson III, Assistant Attorney General, pursuant to the request of the court and asked that his answer be filed by court order pursuant to an order entered in this matter dated December 30, 1969, wherein his motions for summary judgment and for a continuance and/or stay were deferred for consideration by the convening of a three-judge court. Furthermore, the defendant requests that the filing of this answer will not render his motions as moot but asks that the court rule on them as this answer is being filed pursuant to the court's request.

Accordingly, it is ORDERED that the answer is hereby filed pursuant to the court's request, and it is further ORDERED that defendant's motions for summary judgment and for continuance and/or stay are hereby to be considered by the court in its final decision.

ENTER:

/s/ John A. Field, Jr.
District Judge

DATE:

Prepared by:

JAMES G. ANDERSON III
Assistant Attorney General
Counsel for Defendant

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. CH 69-232

[Filed Mar. 10, 1970, Clerk's Office, U. S. Dist. Court, So. Dist. of W. Va., James A. McWhorter, Clerk]

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

v.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

ANSWER OF GEORGE WARNER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY OF JUSTICE OF THE PEACE OF KANAWHA COUNTY, LOUDEN DISTRICT, WEST VIRGINIA

The defendant, George Warner, individually and in his official capacity, for answer to the complaint heretofore filed, states as follows:

"I

"COMPLAINT"

The defendant, for answer to that portion of the complaint referred to as "I Complaint", answers as follows:

I

The defendant denies the allegations contained in paragraph 1 of the complaint and states that Chapter 50, Article 15, Section 2 of the West Virginia Code of 1931, as amended, is constitutional and does not create discrimination for the reasons that the Constitution of the United States, particularly the Fourteenth Amendment thereto, does not guarantee as a part of the Equal Pro-

tection and Due Process Clause anything more than to be heard by a court in a civil action.

II

The defendant denies the allegations contained in paragraph 2 of the complaint.

III

The defendant denies the allegations contained in paragraph 3 of the complaint.

IV

The defendant states that he is without sufficient information to answer the allegations in paragraph 4 of the complaint, but for the purposes of this suit admits the allegations.

V

The defendant admits the allegations contained in paragraph 5 of the complaint.

VI

The defendant admits the allegations contained in paragraph 6 of the complaint.

"II

"STATEMENT OF THE CLAIM"

The defendant, for answer to that portion of the complaint referred to as "II Statement of the Claim", answer as follows:

I

The defendant admits the allegations contained in paragraph 1 of Statement of the Claim.

II

The defendant admits the allegations contained in paragraph 2 of the Statement of the Claim.

III

The defendant admits the allegations contained in paragraph 3 of the Statement of the Claim.

IV

The defendant states that he is without sufficient information to answer the allegations of paragraph 4 of the Statement of the Claim, but for the purposes of this suit admits the allegations.

V

The defendant states that he is without sufficient information to answer the allegations of paragraph 5 of the Statement of the Claim, but for the purposes of this suit admits the allegations.

VI

The defendant admits the allegations contained in paragraph 6 of the Statement of the Claim.

VII

The defendant admits the allegations contained in paragraph 7 of the Statement of the Claim.

VIII

The defendant admits the allegations contained in paragraph 8 of the Statement of the Claim.

IX

The defendant states that he is without sufficient information to answer the allegations of paragraph 9 of the Statement of the Claim, but for the purposes of this suit admits the allegations.

X

The defendant admits the allegations contained in paragraph 10 of the Statement of the Claim.

XI

The defendant denies the allegations contained in paragraph 11 of the Statement of the Claim.

"III

"CAUSES OF ACTION"

The defendant, for answer to that portion of the complaint referred to as "III Causes of Action," states as follows:

I

The defendant admits the allegations contained in paragraph 1 of the Causes of Action.

II

The defendant states that he is without sufficient information to answer the allegations of paragraph 2 of the Causes of Action, but for the purposes of this suit admits the allegations.

III

The defendant denies the allegations contained in paragraph 3 of the Causes of Action.

IV

The defendant denies the allegations contained in paragraph 4 of the Causes of Action.

WHEREFORE, defendant requests that judgment be rendered in defendant's favor against the plaintiffs for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law in that Chapter 50, Article 15, Section 2 of the West Virginia Code of 1931, as amended, is not in violation of the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

/s/ George Warner
Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia

By Counsel

JAMES G. ANDERSON III
Assistant Attorney General
State Capitol
Charleston, West Virginia

Counsel for Defendant

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

George Warner, the defendant named in the foregoing answer, after being first duly sworn, says that he knows the contents thereof, and that the facts and allegations therein contained are true except insofar as they are stated to be on information, and that insofar as they are therein stated to be on information he believes them to be true.

/s/ George Warner
GEORGE WARNER

Taken, sworn to and subscribed before me this 10 day of March, 1970.

/s/ Corena Mae Melton
Commissioned as
Corena Mae Shiflett

My commission expires January 30, 1979.

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action No. 69-232 CH

[Filed Sep. 13, 1972, Clerk's Office, U. S. Dist. Court, So. Dist. of W. Va., James A. McWhorter, Clerk]

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFF

versus

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

THREE-JUDGE COURT

Argued July 3, 1972 Decided August 25, 1972

Before FIELD, Circuit Judge, and CHRISTIE and KNAPP, District Judges

---

JOHN L. BOETTNER, JR., ESQ., J. DAVID CECIL and HERMAN CANADY, JR., Legal Aid Society of Charleston, for plaintiffs, and JAMES G. ANDERSON, III, Assistant Attorney General, for defendants.

KNAPP, District Judge:

On November 7, 1969, plaintiffs instituted the above styled civil class action challenging the constitutionality of Chapter 50, Article 15, Section 2, of the West Virginia

Code of 1931, as amended. The statute in question requires the posting of bond in a penalty double the amount of the judgment in order to perfect an appeal from a judgment rendered by a Justice of the Peace in a civil action. In addition, plaintiffs sought injunctive relief to prevent execution on a judgment entered by defendant, George Warner, Justice of the Peace, and against plaintiff, in a civil action on contract, and requested that the time to appeal from the judgment be tolled.

Relief was sought pursuant to 42 U.S.C. §§ 1983, 1981 and 1988 and jurisdiction was invoked under 28 U.S.C. § 1343(3) and (4). By order of this Court, entered December 30, 1969, the defendant, George Warner, Justice of the Peace, and all other justices of the peace of the State of West Virginia, were enjoined from issuing any execution on the judgment rendered against plaintiff, Clover Patterson, in the state civil suit of Graham Motor Company v. Clover Patterson, on October 23, 1969, until such time as the issues raised herein were resolved and determined. Motions for Summary Judgment and for a Stay of Continuance, filed by defendants, were deferred until the convening of a three-judge court to hear and resolve the matter.

Pursuant to 28 U.S.C. § 2284, a three-judge court was designated, and on July 3, 1972, convened to hear counsels' arguments on plaintiff's request for declaratory and injunctive relief and defendant's Motion for Summary Judgment. Set for hearing on the same date was the case of Coretta Bias v. Joe Gies, et al., Civil Action No. 70-20. This action raised the identical issue presented in the instant case. It was agreed that the decision rendered herein shall be dispositive of said Civil Action No. 70-20.

The factual allegations of the complaint were admitted in the answer and counsel for both parties agreed that no further supporting papers, depositions, affidavits, or testimony would be required, and that the matter could be submitted to the Court on the record.

The facts, which are undisputed, may be briefly summarized as follows:

In November, 1968, plaintiff purchased, under a deferred purchase money contract, a used 1959 Dodge station wagon from the defendant, Graham Motor Company, Charleston, West Virginia. The balance payable was evidenced by a negotiable promissory note. Subsequent to the delivery of the vehicle, the owner encountered numerous mechanical defects in same, and allegedly being unable to obtain satisfactory repairs from Graham Motor Company, plaintiff repudiated the agreement and ceased payment thereon. On October 23, 1969, the plaintiff appeared before Justice of the Peace, George Warner, to answer an action for money due on contract instituted by Graham Motor Company. Plaintiff, defendant therein, raised numerous defenses, including breach of warranty, fraud, and repudiation. However, judgment was awarded by said Justice of the Peace to Graham Motor Company against Clover Patterson in the amount of $300 plus costs.

An appeal from the foregoing judgment was demanded by the plaintiff. Surety bond in the penalty of $600 was set in accordance with the provisions of the West Virginia statute, Chapter 50, Article 15, Section 2. Plaintiff did not have available an individual surety or a $36 fee for a commercial bond. As a result of his inability to perfect the appeal, the judgment against plaintiff in the amount of $300 became final.

Plaintiff, Clover Patterson, was accorded a full trial on the merits of his case in the Justice of the Peace court. Having received a hearing with full opportunity to present every available defense, the Due Process Clause of the Fourteenth Amendment is satisfied. There is no requirement that the state provide appellate review. *Lindsey* v. *Normet*, 405 U.S. 56 (1972) and cases cited therein. However, appellate review of the judgment of a Justice of the Peace is made available by statute, and it is the bond provision of same that is under attack in this proceeding.

The specific statute, Chapter 50, Article 15, Section 2, which plaintiff seeks to have declared unconstitutional reads in part:

"50-15-2 Appeal Bond

> The appeal shall not be granted by the justice unless, within ten days after the judgment is rendered . . . bond with good security, to be approved by the justice, in a penalty double the amount of the judgment, is filed with him, with condition to the effect that the person proposing to appeal will perform and satisfy any judgment which may be rendered against him on such appeal . . ."

The West Virginia courts have consistently and clearly held that the above quoted statute makes the posting of a surety bond mandatory. No appeal will be granted unless a bond with good security is approved by the Justice of the Peace and filed with him. *Staats* v. *McCarthy*, 130 W. Va. 240, 43 S.E.2d 826 (1947).

Plaintiff argues that the surety bond requirement of the foregoing statute results in arbitrary and invidious discrimination among individuals on the basis of wealth in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and his right to petition the government for a redress of grievances as guaranteed by the First Amendment. Defendant contends that the posting of the bond is a protection to which the person receiving judgment is entitled and further, that it serves to discourage frivolous litigation.

Presented by the facts herein are these questions: (1) Is the right to appeal the lawful judgment of a court of competent jurisdiction in a civil action absolute and uninhibited, and (2) If such appeal is not a matter of right, then to what extent and in what particulars may it be restricted and regulated. Succinctly stated, does Equal Protection as contemplated by the Fourteenth Amendment to the Constitution forbid conditions precedent to an appeal that involve the financial ability of the judgment debtor and create a de facto classification of citizens—the rich and the poor.

The idea of equality before the law for rich and poor alike is one of the oldest and most fundamental aims of our legal system. However, under the common law the

courts had no authority to permit a suitor to bring or carry on an action as a pauper. *LaBarbera* v. *Hart & Crouse Co.*, 248 App. Div. 261, 289 N.Y.S. 567, appeal dismissed, 272 N.Y. 534, 4 N.E.2d 435. Consequently, the right of a party to proceed in forma pauperis either in the trial court or on appeal has been governed wholly by statute. Annot., 11 A.L.R.2d. Forma Pauperis Suit-Non Party, p. 607, 608. Legislatures, except where inhibited by Constitutional mandate, have had the power generally to regulate appellate procedure, including the authority to require the giving of a bond as a condition precedent to the consummation of an appeal. 4A C.J.S. Appeal & Error, § 502, p. 208. In many jurisdictions, statutes have been passed requiring, as a condition precedent to taking or perfecting an appeal, that the appellant, or plaintiff in error, must give a bond, recognizance, or undertaking for payment of the judgment, order or decree. At least a substantial compliance with such statutes has been held essential to valid appeals or proceedings in error. *Brown* v. *S. H. Kress and Co.*, 207 N.C. 722, 178 S.E. 248; *Southern Ry. Co.* v. *Thomas*, 182 Va. 788, 30 S.E.2d 575. Moreover, statutes restricting the appellate process have been held not to violate constitutional provisions granting the right of appeal inasmuch as they are considered merely regulatory of the method for exercising the right. *Austin* v. *Oviedo*, 92 So.2d 648 (Fla.). In addition, poverty or inability to procure sureties has been found insufficient to relieve an appellant, or plaintiff in error, from the necessity of giving an appeal bond or other security absent statutory mandates. *Going's Administratrix* v. *Norfolk & Western Railway Co.* 11 Va. 543, 89 S.E. 914, aff'd 248 U.S. 538.

More recently, however, the constitutional guarantees of Due Process and Equal Protection have been held to require that appellate review in criminal cases, if made generally available, not be denied merely because of defendant's inability to pay the costs attendant upon the securing of such review. *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214; *Griffin* v. *Illinois*, 351 U.S. 12.

Although no court has yet clearly resolved the specific issue here involved, the Supreme Court has passed upon allied questions in some cases in this particular area of the law. These cases, hereinafter discussed, are *Griffin* v. *Illinois*, supra; *Boddie* v. *Connecticut*, 401 U.S. 371, and *Lindsey* v. *Normet*, supra. The latter named case is particularly pertinent to our discussion.

In *Griffin* v. *Illinois*, supra, plaintiff was convicted in a state court of armed robbery. In order to appeal a conviction in Illinois, the appellate court must be furnished with a bill of exceptions or report of the trial procedure certified by the trial judge. It is sometimes impossible to prepare such document without a stenographic transcript of the trial proceedings, which is furnished free only to indigent defendants sentenced to death. Plaintiff alleged that he was without funds to pay for a transcript and that the failure of the courts to provide it to him was a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Supreme Court held that plaintiff's constitutional rights were violated. Justice Black, speaking for the court, used this language:

> ". . . Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings, the Due Process and Equal Protections Clauses protect persons like petitioners from invidious discriminations."

It is clear from Justice Black's opinion, which studiously omits any reference to civil actions, that the Supreme Court limited the effect of its holding to criminal actions. Criminal actions, by their very nature, demand greater protections to safeguard defendants. Civil suits, however, are a vehicle by which people are given an opportunity to use a neutral government agency to adjust their differences. No deprivation of liberty is involved. Our Federal Constitution does not place civil disputes on the same plane as criminal. For this reason, this Court does not consider the Griffin case controlling on the issue herein raised. The Griffin case held simply that the Equal

Protection Clause imposes an affirmative duty on the government to lift the handicaps flowing from different economic circumstances in criminal cases.

In *Boddie* v. *Connecticut*, supra, the Supreme Court held that, in view of the basic position of the marriage relationship in society, and the state monopoly on the means for dissolving that relationship, Due Process prohibits a state from denying, solely because of inability to pay court fees and costs, access to its courts to indigents, who, in good faith seek judicial dissolution of their marriage. The Court, as indicated, bases its determination therein on the Due Process Clause of the Fourteenth Amendment; not the Equal Protection Clause.

It is to be further noted that the *Boddie* case is clearly distinguishable from the case at bar. In *Boddie*, without the payment of a fee, plaintiff was not given a meaningful opportunity to be heard, appropriate to the nature of the case. Here plaintiff was afforded an opportunity to be heard, and availed himself of that opportunity. He now argues that he has an absolute right to appeal without being hampered by financial requirements. Although the Court in *Boddie* cited the *Griffin* case, it emphasized that its decision went no further than to dispose of the particular case before it wherein the right to access to the courts "is the exclusive precondition to the adjustment of a fundamental human relationship—marriage." Again, it appears clear that the Supreme Court intended to limit the scope of its decision. A sales contract cannot be equated with a marriage contract. Sales contracts can be terminated without court action, marriages cannot. Nor can the initiation of a suit be equated with an appeal.

Moreover, as hereinbefore indicated, it is settled law that an appeal in forma pauperis is a privilege, not a right, and no requirement of Due Process is involved. *Dorsey* v. *Gill*, 147 F.2d 857 (N.D. Ind. 1945), cert. den. 325 U.S. 890, *Williams* v. *McCulley*, 131 F. Supp. 162 (D.C. La. 1955), and *Nichols* v. *McGee*, 169 F. Supp. 721 (N.D. Calif. 1959), appeal dismissed, 361 U.S. 6.

The case most closely in point with the issues raised herein is *Lindsey* v. *Normet*, supra. In *Lindsey* appellants, tenants of appellee, refused to pay their monthly

rent unless certain substandard conditions were remedied. Appellees threatened eviction. Appellants then filed a class action seeking to have the Oregon Forcible Entry and Wrongful Detainer statute declared unconstitutional. One of the provisions attacked in that action was the requirement of posting bond on appeal with two sureties in twice the amount of rent expected to accrue pending an appellate decision, the bond to be forfeited if the lower court decision is affirmed.[1] This requirement was in addition to the general appeal bond provisions of the Oregon law which are also a precondition to appeal and afford adequate protection to the landlord against loss pending the outcome of the appeal.[2] The Court, while

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[1] "105.160 Additional undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from the judgment until he gives, in addition to the undertaking now required by law upon appeal, an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff if the judgment is affirmed on appeal of twice the rental value of the real property of which restitution is adjudged from the commencement of the action in which the judgment was rendered until final judgment in the action."

[2] "19.040 Form of undertaking on appeal; conditions for stay of proceedings; enforcement against sureties on dismissal of appeal. (1) The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal; but such undertaking does not stay the proceedings unless the undertaking further provides to the effect following:

(a) If the judgment or decree appealed from is for the recovery of money, or of personal property or the value thereof, that if the same or any part thereof is affirmed, the appellant will satisfy it so far as affirmed.

(b) If the judgment or decree appealed from is for the recovery of the possession of real property, for a partition thereof, or the foreclosure of a lien thereon, that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if such judgment or decree or any part thereof is affirmed, the appellant will pay the value of the use and occupation of such property, so far as affirmed, from the time of the appeal until the delivery of the possession thereof, not exceeding the sum

holding that the double bond pre-requisite for filing an appeal violated the Equal Protection Clause of the Fourteenth Amendment, used the following language:

> "While *a State may properly take steps to insure that an appellant post adequate security before an appeal* to preserve the property at issue, *to guard a damage award already made*, or to insure a landlord against loss of rent if the tenant remains in possession, the double bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord." [Emphasis Supplied]

In *Lindsey*, it was not the purpose of the double bond requirement to protect the damage award, or the property to which an appellee might rightfully be entitled because of a lower court judgment. It was unrelated to the actual rent accrued or to the specific damage sustained by the landlord. Rather, the stakes were automatically doubled when a tenant sought to appeal an adverse decision. The end result of the application of the Oregon statute was to penalize an appellant who lost an appeal that may very well have been prosecuted in good faith. However, it should be noted that the Court in the very language used to strike down the special bond requirement of the Oregon statute under attack in *Lindsey*, inferentially approves the general Oregon bond statute which is substantially similar to that under attack in the case at bar.

The purpose of the bond provided by West Virginia law is to protect the person receiving the judgment in the Justice of the Peace Court; it is not penal in nature. The bond, given pursuant to the statute in question, is security which the statute substitutes for the advantage which plaintiff gains by his judgment. *Chewning* v. *Tomlinson*, 105 W. Va. 76, 141 S.E. 532. Its requirements are substantially the same as those of the general Oregon appeal bond statute, and serves the same purpose. While it is true that the general appeal bond statute of the State of Oregon was not under attack in *Lindsey*, and

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therein specified, to be ascertained and tried by the court or judge thereof. . ."

whether it was violative of the Equal Protection Clause of the Fourteenth Amendment was not directly in issue, yet the language of the Court above quoted is so clear and unequivocal there can be little doubt of the Court's views. It is also to be noted that Justices Douglas and Brennan who filed dissents did not take issue with the requirements, or the purpose of the general Oregon appeal bond statute.

As is urged herein, it is quite true that our legal system has recently undergone profound changes in keeping with today's special emphasis on individual rights, growing out of which has been the vindication of basic protections for the poor and the deprived among us. A person in that category may proceed in a criminal action in forma pauperis, and he may institute civil actions in forma pauperis. Responsible members of a democratic society are fully agreed that every citizen, without regard to his ability to pay or the possible frivolity of his alleged claim, is entitled to a fair and just adjudication of his grievance, whatever it may be, in accordance with the constitutional principles of Due Process and Equal Protection. In the instant case, however, there is no contention that palintiff was denied due process or other basic right during the course of litigation. He complains only that the bond prerequisite to appeal denies him Equal Protection of the Laws under the Fourteenth Amendment, and his right to petition his government for a redress of grievances under the First Amendment.

It is the Court's opinion that any First Amendment rights which may be indicated under the facts here are fully merged in, and circumscribed by, the Equal Protection of the Laws requirements of the Fourteenth Amendment. It is our further opinion that the concept of Equal Protection does not include full and unrestrained appellate review of an initial adjudication which afforded Due Process. Equal Protection, as a constitutional requirement, by its very nature, cannot be literally interpreted. It must be viewed and weighed in the light of certain basic factors inherent in the functioning of a workable and fair system of justice. Included therein are equality, uniformity, efficiency, and practicality. Con-

stitutional protections are not absolute. They must yield to accommodation when overriding interests of public policy are at stake. The Courts have consistently recognized that parties who prevail in the lower court are entitled to some protection of their property interests when the losing party decides to appeal. Justice Burton speaking for the Court in *National Union* v. *Arnold*, 348 U.S. 37, clearly expressed this premise in these words: "Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration." Moreover, taxpayers who must shoulder a major portion of the costs of in forma pauperis proceedings are also entitled to consideration in placing reasonable restrictions and conditions on the appellate process.

Accordingly, we conclude that the provisions of Chapter 50, Article 15, Section 2, of the Code of West Virginia of 1931, as amended, required to be met as a prerequisite to perfecting an appeal from the final judgment of a Justice of the Peace in West Virginia is not violative of the Equal Protection of the Laws Clause of the Fourteenth Amendment of the Constitution of the United States, and is therefore constitutional and valid, and consequently, the relief sought herein by plaintiff is denied.

/s/ Dennis R. Knapp
U.S.D.J.

I concur.

/s/ Sidney L. Christie
U.S.D.J.

I concur.

/s/ John A. Field, Jr.
U.S.C.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. 69-232 CH

[Entered Sep. 13, 1972, Civil Order Book, No. 31, Page 47]

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFF

versus

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

ORDER

For the reasons set forth in the opinion of the Court dated August 25, 1972, and concurrently filed herewith, it is ADJUDGED and ORDERED as follows:

(1) Chapter 50, Article 15, Section 2 of the West Virginia Code is found and declared to be constitutional and valid.

(2) The relief sought by plaintiff herein is accordingly denied.

(3) Nothing further remaining to be done herein it is ORDERED that this case be retired from the docket of this Court.

The Clerk is directed to serve an attested copy of this order, with a copy of said opinion attached thereto, by United States Mail, upon each counsel of record.

ENTER:

/s/ John A. Field, Jr.
United States Circuit Judge

/s/ Sidney L. Christie
United States District Judge

/s/ Dennis R. Knapp
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 72-5830

CLOVER PATTERSON, APPELLANT

v.

GEORGE WARNER, ETC., ET AL.

ON CONSIDERATION of the motion of the appellant for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

March 26, 1973

SUPREME COURT OF THE UNITED STATES

No. 72-5830

CLOVER PATTERSON, APPELLANT

v.

GEORGE WARNER, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

March 26, 1973

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FILED
JUN 27 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5830

CLOVER PATTERSON,

Appellant,

v.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR APPELLANT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5830

CLOVER PATTERSON,

Appellant,

v.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the United States District Court for the Southern District of West Virginia, entered on September 13, 1972, is unreported, however it is reproduced in the Single Appendix.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1253, which authorizes a direct appeal from a judgment by a three-judge district court denying an injunction restraining the enforcement of a state statute. The Court below was a statutory three-judge panel convened pursuant to Title 28, United States Code, Section 2281, *et seq*, which dismissed appellant's action seeking to hold the requirement of posting a bond double the amount of the judgment in order to perfect an appeal from a judgment rendered by a justice of the peace in a civil action as violative of the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. The District Court's jurisdiction was invoked pursuant to Title 28, United States Code, Sections 1343, 2201, and 2202, and Title 42, United States Code, Sections 1981, 1983, and 1989.

The District Court judgment was entered on September 13, 1972; appellants notice of appeal was filed on October 24, 1973; the case was docketed in this Court on December 6, 1972, as No. 72-5830; probable jurisdiction was noted March 26, 1973.

PROVISIONS OF THE UNITED STATES CONSTITUTION

Fourteenth Amendment:

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

West Virginia Code 50-15-2:

The appeal shall not be granted by the justice unless, within ten days after the judgment is rendered or revived or an order is entered refusing to set aside a judgment, bond with good security, to be approved by the justice, in a penalty double the amount of the judgment, is filed with him, with condition to the effect that the person proposing to appeal will perform and satisfy any judgment which may be rendered against him on such appeal by the court to which the appeal is taken as provided in section one [§50-15-1] of this article, or if he does not wish to stay the execution on such judgment, with condition to pay the costs of such appeal if the judgment appealed from be affirmed. In case there be judgment before the justice against the plaintiff for costs only, and the plaintiff desires to appeal, the bond shall be for costs, conditioned as aforesaid, and in a penalty not exceeding one hundred dollars. In suits for the forcible or unlawful entry upon land, or for the unlawful detention of real estate, if judgment be rendered for recovery of possession of the premises, either with or without damages for detention, the bond shall be in a penalty double the amount of the damages, where judgment has been rendered for damages for the detention, together with an amount sufficient, in the opinion of the justice, or of the circuit or other appellate court or judge thereof, when the appeal is granted by such court or judge, to cover one year's rent of the

premises. In such suits where the judgement is not for damages for detention the bond shall be in a penalty equal to an amount sufficient, in the opinion of the justice, or of the circuit or other appellate court or judge thereof, when the appeal is granted by such court or judge, to cover one year's rent of the premises, and an additional sum of not less than fifty nor more than one hundred dollars.

PROVISIONS OF THE WEST VIRGINIA CONSTITUTION

Article VIII, Section 28:

The civil jurisdiction of a justice of the peace shall extend to action of assumpsit, debt, detinue and trover, if the amount claimed, exclusive of interest, does not exceed three hundred dollars. The jurisdiction of justices of the peace shall extend throughout their county; they shall be conservators of the peace and have such jurisdiction and powers in criminal cases as may be prescribed by law. And justices of the peace shall have authority to take the acknowledgement of deeds and other writings, administer oaths, and take and certify depositions. And the legislature may give to justices such additional civil jurisdiction and powers within their respective counties as may be deemed expedient, under such regulations and restrictions as may be prescribed by general law, except that in suits to recover money or damages, their jurisdiction and powers shall in no case exceed three hundred dollars. Appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law.

QUESTIONS PRESENTED

1. Whether it is logical to provide, as a matter of due process, the right to be represented by counsel in civil cases, and to require such representation in criminal cases, but to deny the right to have a case decided by one learned in the law?

2. Because of the historical antecedents of the present day justice of the peace system, did the framers of West Virginia's constitution intend to include review as a matter of right, and as a matter of choice, in the judicial process.

3. Whether the financial interest of a tribunal in the outcome of a case is so prejudicial as to deny appellant due process of law?

4. If there exists in West Virginia an absolute right of appeal in the justice of the peace system, and if there exists an interest in the appellant in having his case adjudicated by a fair and adequate tribunal, are these interests so significant as to be deemed fundamental?

5. Will due process strike at any bar to access to the courts when a fundamental interest is involved?

6. Given the appellant's fundamental interest in access to the courts, does the state have any compelling interest in maintaining the double bond provision that conditions his access to a court of record?

7. Does the double appeal bond requirement bear a reasonable relationship to the state's interests in protecting monetary judgments, safeguarding its judicial system or offsetting its court expenses?

STATEMENT OF THE CASE

In November of 1968 appellant purchased a used automobile from appellee Graham Motor Company by a conditional sale with the balance due represented by a negotiable promissory note. Subsequent to the delivery of the vehicle and prior to full payment on the contract, appellant encountered numerous mechanical defects in the car, and, after being unable to obtain satisfaction from his vendor, appellant repudiated his agreement with appellee. Appellant then made no further payments on the contract.

On October 23, 1969, appellant received notice to appear in the court of appellee Justice of the Peace George Warner in order to answer a law suit filed against him by appellee Graham Motor Company. Appellant appeared and asserted various defenses to Graham Motor Company's claim upon the above described contract, however judgment was cast against appellant in the amount of three hundred dollars ($300.00). Appellant, believing an injustice had been worked against him, sought to appeal his case in order to be heard before a learned judge in a court of record. But, in order to perfect his appeal, appellant was required to satisfy a statutory bond requirement in the amount of six hundred dollars ($600.00), twice the amount of the judgment. Because of appellant's poverty he was unable to meet this condition of appeal.

Prior to execution upon the judgment, appellant sought, and was granted a hearing by a three-judge Federal District Court upon his application for injunctive and declaratory relief on grounds that his civil rights were being denied. There it was held that the double-bond to appeal provision in the West Virginia Code was constitutional, and all relief was denied. This appeal was then filed.

SUMMARY OF ARGUMENT

The West Virginia Constitution provides for what is in essense two systems of trial courts in the state: courts of record, and courts not of record. The latter is a justice of the peace system, an anachronism which provides only for a hearing before a lay-judge. Because a justice of the peace with civil jurisdiction was unknown at common law, the state constitution further provides for review of the decision made by the lay-judge in a court of record before a learned-judge. This review, a trial de novo, also allows the appellant to be heard in a tribunal that has no pecuniary interest in the outcome of the case. However, when the framers of the West Virginia Constitution provided a litigant access to the system of courts of record, they also allowed the state legislature to regulate an appellant's avenue to such a hearing by procedural devices. Appellant contends that the imposition of a statutory double appeal bond is not a reasonable regulation and denies him due process and equal protection of the law.

In the due process argument appellant contends that because of the nature of the justice of the peace system, appellate review is part and parcel of the whole hearing process, and therefore rises to a fundamental interest that may not be denied by an arbitrary cost requirement that impedes access of an indigent to a fair and adequate hearing.

In the equal protection argument appellant asserts that the double bond requirement infringes upon his fundamental interests in access to the courts and cannot be justified by either a rational or a compelling state interest.

I.

DUE PROCESS DEMANDS A HEARING APPROPRIATE TO THE NATURE OF THE CASE, AND BECAUSE OF THE NATURE OF THE JUSTICE OF THE PEACE SYSTEM, A MEANINGFUL HEARING INCLUDES APPELLATE REVIEW.

The justice of the peace system as originally instituted in the United States played an important role in local law enforcement. In the formative years of this country the lack of attorneys and the relative isolation of the various settlements along the eastern seaboard required the transplanting of a system of readily accessible small courts from their origin in medieval England to the American Colonies. And for these same reasons the framers of the West Virginia Constitution saw fit to retain the office of justice of the peace. Silverstein, *Small Claims Courts versus Justices of the Peace*, 53 W. Va. L. Rev. 241, 242 (1956). Thus the State Constitution now provides for what is in essence two systems of trial courts: courts of record–circuit courts and various inferior tribunals–and courts not of record–justices of the peace. Constitution Article 8, Section 1; *Richmond v. Henderson*, 48 W. Va. 389, 398-399, 37 S.E. 653 (1900).

Courts not of record are presided over generally by a lay judge. See *State ex rel. Moats v. Janco*, ___ W. Va. ___, 180 S.E. 2d 74, 78 (1971); and since a justice with civil jurisdiction was unknown at common law, *Richmond, supra*, Article 3, Section 28 of the State Constitution provides for review of a justice's decision in a court of record. However, when providing an avenue to a court of record, the framers allowed the legislature to prescribe the manner in which an appeal may be taken. The

question posed here is whether the double-bond requirement, Code 50-15-2, is merely a procedural device that regulates appellant's access to the courts or whether it acts as a bar to the entire process and is therefore in excess of a legislature's power to regulate judicial procedure.

A. The Decision of A Justice of the Peace, Because of His Lay-Judge Status, Does Not in and of Itself Deny Due Process, But the Bar To Review of Such A Judgment by A Learned Judge Is Contrary to Due Process of Law.

The justice system in England had special safeguards to prevent abuses that were never adopted in West Virginia. For example the selection and qualification of the justice was all important. As one commentator has pointed out:

> "two or three of the best reputation in each county" were to be selected. They were to be "of the best reputation and most worthy men in the county", and as if even that had proved inadequate more stringent requirements were set up by a later statute which ordered them to be "of the most sufficient knights, esquires, and gentlemen." Curl, *A Challenge For Unremitting Activity for Reform of Lower Courts*, 50 W. Va. L. Q. 106, 121 (1947).

However, today, as the West Virginia Supreme Court noted in *State ex rel. Moats v. Janco, supra*, there are no qualifications prescribed for justices of the peace. Neither the state constitution, state statutes nor the common law set forth any eligibility requirement (except that he "shall reside in the district for which he is elected," Const. Art 8, §27) so that "it is possible, under our

system, to elect to this office a man or woman who can neither read nor write. Just anybody can be elected . . . ." 50 W. Va. L. Q. *supra*, at 112. And, in that as of the time this action arose, and, in that as of the time of this appeal, there is only one justice in the entire State of West Virginia who was or is an attorney,[1] appellant suggests that appellee Justice Warner is not competent to adjudge the underlying merits in this matter to a conclusion without some form of review by a learned judge.

It has long been recognized that attorneys are more capable of handling legal matters than are laymen. This fact is the basis of the constitutional right of a party in a civil suit to be represented and heard by counsel. *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Brotherhood of RR Trainmen v. Virginia*, 377 U.S. 1, 6-7 (1964); *United Mine Workers v. Ill. State Bar Assoc.*, 389 U.S. 353, 356 (1967); *Ward v. Winchester*, 11 Va. L. Reg. 501 (1902). Indeed, the difference in competence is so great that in the area of criminal proceedings this Court has recently determined that lawyers must not only be provided for indigent defendants in felony matters but also in misdemeanors where a loss of liberty is likely. *Argersinger v. Hamlin*, 407 U.S. 25, (1972). There Mr. Justice Douglas, quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932) and *Gideon v. Wainwright*, 372 U.S. 342, 344 (1963) stated:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.

* * * * *

[1] In a negative manner, the official state register, *West Virginia Blue Book*, volumes 53-56 for the years 1969-1972, indicates that Carrol T. Lay of Summersville District, Nicholas County, is the only licensed attorney in the office of justice of the peace.

> . . . in our adversary system of criminal justice any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. 407 U.S. at 31.

Surely it is illogical to guard so jealously a party's constitutional right to be represented in civil and criminal matters, and yet to forbid the party by what purports to be a procedural device from having his case heard by an attorney judge. To suggest that the lawyer's role is somehow constitutionally more significant than the role of the judge renders the right to counsel of little avail if the presiding judge is incapable of understanding arguments advanced by counsel. *Cf.* 50 W. Va. L. Q. at 121. (remarks of Judge Simms)

The distinction in ability between an attorney-judge and lay-judge was recognized by the Court in a case involving what has traditionally been regarded as a civil matter: juvenile proceedings. *In re Gault* 387 U.S. 1, 17 (1967). In *Gault* this Court took special note of the general absence of judicial qualifications in juvenile matters, and particularly the non-attorney status of many juvenile judges. 387 U.S. at 14, fn. 14. This lack of "expertise, the keystone of the whole venture," led the Court, among other things, to conclude "that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Id.* at 18.[2] What is left then in the lay-judge situation, is not

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[2]In 1900 the West Virginia Supreme Court in *Richmond v. Henderson, supra*, noted the disparity between courts of record (presided over by a learned judge) and a justice of the peace court (presided over by a lay judge) when it was concluded that because the justice system with civil jurisdiction was unknown at common law, and a (then) recent amendment to the state constitution did not elevate the status of the justice court to that of a court of

rule by law but a latitude of decision-making that may best be characterized as rule by fiat.

While the advantages of rule by law vis-a-vis rule by fiat should be apparent, they were succinctly stated by Dean Pound as:

> "*Administration of justice according to law has six advantages:* (1) Law makes it possible *to predict* the course which the administration of justice will take; (2) *Law secures against errors of individual judgment*; (3) Law *secures against improper motives* on the part of those who administer justice; (4) Law *provides* the *magistrate with standards* in which the ethical ideas of the community are formulated; (5) Law gives the magistrate the *benefit* of all the *experience* of his predecessors; (6) Law *prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty immediate interests*." Pound, "Justice According to Law," *Essays on Jurisprudence from the Columbia Law Review* 230 (1963). [Emphasis added.]

Unfortunately the untrained judge is usually not able to take advantage of principle and procedure and often is faced with difficulties which are described below:

> "With no training in the law, no training in the process of judicial thought, and no mental habit of mind acquired by constant experience in legal reasoning, it would indeed be strange if a [lay

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record, the constitutional prohibition against a review of facts found by a jury was inapplicable to a jury verdict in a justice of the peace court. 481 W. Va. at 398-399. *Cf. Bendheim Bros. & Co. v. Baldwin*, 73 Ga. 594 (1884) (Suggesting that lay judge should not even undertake to instruct a jury because of a lack of legal knowledge); *People ex rel Mann*, 97 N.Y. 533 (1892) (commenting on the historic administrative function of a justice and the gradual accretion of judicial function.)

> judge] did not treat each case as a unique proposition. He has no category or class into which he may place it, no analogies from which to draw to solve the new problem before him. He has no legal rules, principles or standards by which to judge the merits of the controversy to be decided. Wholly unlike the judge who is trained in the law, he has no precedents to guide him. In deciding the cause before him, the lay judge is necessarily limited by his own personal experience acquired in the short span of a single lifetime. He cannot call on the legal experience of the ages to assist him but is helpless to any more than apply his own personal notions of right and wrong to the case at hand. The justice which such tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise [the system] . . . . Such justice is not justice at all. It is unequal, uncertain, and capricious. Smith, *The Justice of the Peace System*, 15 Cal. L. Rev. 118, 127-128 (1927) (quoting from Pound, *Outlines of Lectures on Jurisprudence*) (3rd ed.) 75.

While it may occur in some quarters to argue that the inability to comprehend the nature of a legal defense is a quality which might also be found in attorney-judge, and that there are laymen, and undoubtedly many self-educated men, who could render competent judgment, this presupposes that formal legal training and experience are totally irrelevant in legal decision making. The fact that error may exist in the administration of justice by learned men cannot justify a system in which the frequency of error is multiplied by the lack of expertise. This is particularly true when the possibility for redress may be foreclosed by a cost requirement.

To be sure, appellant does not contend that the fact appellee Warner is not an attorney violates his right to due process. *State ex rel Moats v. Janco, supra.* But he does contend that given the nature of the justice of the peace system his right to be heard includes the appellate process.

The essence of due process under the Fourteenth Amendment is the right to be heard "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 300 U.S. 545, 552 (1966), in a "hearing appropriate to the nature of the case," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In 1899 this Court, in *Capitol Transaction Co. v. Hof*, 174 U.S. 1, considered the nature of a meaningful hearing in the District of Columbia justice of the peace system. There it had been contended that Capitol, who was the defendant in an action in a justice court, was being denied its Seventh Amendment right to trial by jury because a jury before a justice of the peace was unknown at common law and therefore it would not receive a fair hearing. This was notwithstanding the fact that Hof had demanded a jury trial and a jury of twelve was convened. Capitol argued that this was not the common law jury required by the Seventh Amendment.

Mr. Justice Gray delivered the opinion of the Court and agreed wih Capitol's argument. A jury free from all judicial control (the justice was not a judge) was not known at common law, 174 U.S. 39, but, citing a line of state decisions, he found that a fair trial was not dispensed with because the liberty of appeal, and trial de novo, preserved the right to a hearing before a common law jury. Id. at 42-43. And, in conclusion, the Court found that the fair hearing–trial by jury–was not unduly obstructed by "security to pay and satisfy the judgment." Id. at 45. But, the size of the bond there was only

"an undertaking to pay and satisfy whatever final judgment may be recovered in the appellate court." Id. at 42. Further, it was held in the state decisions to which Mr. Justice Gray referred that:

> A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury, would be subject to the same considerations as if the object had been openly and directly pursued. Citing *Beers v. Beers*, 4 Conn. 535, 539-540 (1823), 174 U.S. at 28.

Thus it was implied that a monetary hurdle would be questionable even though Mr. Justice Gray was satisfied that because the appellate process afforded the Seventh Amendment Constitutional requirement Capitol was afforded a hearing appropriate to the nature of its case.

Subsequently, in 1900, the West Virginia Supreme Court, relying heavily upon the opinion in *Hof*, decided that Article VIII, Section 28 of the West Virginia Constitution provides the right of appeal from a justice of the peace on law and fact notwithstanding the presence of a jury below. *Richmond v. Henderson*, 48 W. Va. 389, 37 S.E. 653. The reasons assigned in the state decision were several. First, Judge Brannon for the Court pointed out that a justice of the peace with civil jurisdiction was unknown at common law and therefore a jury trial was not necessary below. 48 W. Va. at 398. Second, since the jury was not necessary and since its existence at the justice of the peace level was only the result of an addendum to the constitutional article creating the justice's jurisdiction, that addendum did not have the effect of equalizing a justice of the peace court with the court of record. *Id.* at 399-400. Third, he held, in effect, that a jury before a justice was not a jury because only a jury of twelve was known at common law. *Id.* at 402.

Ergo, the constitutional prohibition against review of a jury's findings did not apply to the justice of the peace system. Finally, the court interpreted the language of the constitutional right to appeal in regard to the nature of the hearing on review as follows:

> "Appeals shall be allowed from the judgments of justices of the peace in such manner as may be prescribed by law." [West Virginia Constitution Article VIII, Section 28.]
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> * * * * *
>
> Now, everybody knows that the legal signification of "appeal," unless the context otherwise manifests, means an appellate process which opens the former judgment and verdict, and sends the case to a higher court for trial *de novo* upon the same facts, or new facts, regardless of the former trial. When the Constitution thus granted an appeal as broad as the whole field of a justices jurisdiction, without any qualification except as the legislature might prescribe, it meant that such appeal should have its ordinary function and efficacy to retry any case, on law and fact, to which the legislature might extend it. It did not tie the power of review down by saying that it should not be made except by the rules of the common law. It applied no limitation; it unreservedly gave this appeal with all the legal incidents of that appeal, one of which is the power to retry questions of fact. *Id.* at 404.

Judge Brannon's decision was grounded not only upon *Hof*, but also on an earlier state opinion in *Evans v. Taylor*, 28 W. Va. 184 (1886), where it was held that the procedure denominated "appeal" is in actuality the removal and transfer of the controversy to a court of record for a second complete hearing. The "appeal" operates so as to vacate the judgment of the inferior tribunal and "renders it ineffectual as the foundation of

an action." 28 W. Va. at 188. These statements provided a basis for Judge Brannon's ruling that because the office of justice of the peace was not rooted in the common law, as was the court of record, there can be no equating of the two systems, and therefore one has an absolute right of review in a court of record. Appellant's right of appeal then, is a fundamental part of the entire judicial process in the justice of the peace system under decision of this Court and the State of West Virginia.

B. The Appellate Process Offers the Only Viable Avenue of Attack Upon the Decision of A Justice of the Peace That Is Void Because He Possesses A Financial Interest in the Outcome of Appellant's Case.

Even before appellee Graham Motor Company instituted the action against appellant in the court of Justice Warner it was favored with the likelihood of success: Chapter 50, Article 17, Section 1 provides, in paragraphs (2) and (9), fees that accrue to the justice only on judgment for the plaintiff.[3] Specifically, paragraph (2) allows $2.50 to be collected

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[3] In *State ex rel Moats v. Janco*, ___ W. Va. ___, 180 S.E.2d 74, 87 (1971) Judge Browning in his dissent stated: "[I]n civil cases the justice receives compensation for trial of the case regardless of whether he finds a judgment for the plaintiff or the defendant just as in a criminal case, but if he finds judgment for the plaintiff, it is probable, not just "remotely possible," that under the provisions of Chapter 50 of the Code, the justice may receive additional costs of "fees," for example, for issuing execution upon the judgment for sale of the defendant's property to satisfy the judgment or for attachment of the defendant's wages to satisfy the judgment. The possibility of additional financial enrichment by finding a verdict for a plaintiff in a civil case far exceeds that for finding a defendant

> For all services in connection with an execution on judgment, suggestion on judgment, execution and garnishment whether execution be without garnishment or suggestee execution.

And paragraph (9) provides 35¢ "For mailing each suggestee execution by registered and/or certified mail and return receipt requested." This 35¢ fee is in addition to postage and other supplies regularly provided by county courts to Justice of the Peace courts. Code 50-19-3.

This Court has held that where a case arises

> which would offer a *possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice clear and true . . . .

that possibility of bias violates due process of law. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). [Emphasis added.]

The *Tumey* "possible temptation" rule was recently quoted with approval in *Ward v. Village of Monroeville, Ohio*, ___ U.S. ___, 93 S.Ct. 80, 83 (1972), wherein convictions in traffic cases were overturned because the mayor, who sat as traffic court judge, had a possible interest as chief executive of the municipality that derived substantial revenue from "fines, forfeitures, costs and fees" imposed by the mayor's court. ___ U.S. ___, 93 S.Ct. at 82. While the benefits to the mayor personally

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guilty of a charge of drunk driving, or for any other misdemeanor. A litigant may be deprived of due process of law in a civil case as well as in a criminal case."

were only indirect, the possible temptation to him in his official capacity rendered his decisions invalid.

In West Virginia, as a matter of state law, this test is stringently applied:

> Where a justice of the peace has *any* pecuniary interest in *any* case to be tried by him, *however remote*, he is disqualified from trying such case. *Janco, supra*, 180 S.E.2d at 80. [Emphasis added.]

Indeed, the ancient maxim *nemo debit esse judet in propria causa*, no man shall be a judge in his own cause, is so strictly applied that any possible temptation renders the judgment void *ab initio*. *Id.* at 81.

Although the underlying judgment against appellant may be void, appellant cannot just ignore the matter and expect it to go away. He has two choices: (1) invoke his constitutional right to appeal, which vacates the judgment and restores the original position of the parties prior to judgment, *Evans v. Taylor, supra*, 28 W. Va. at 188, or (2) attack the judgment collaterally by invoking equitable remedies. The latter course of action would also restore the status quo; the judgment would be declared void—assuming an equitable remedy, traditionally a matter of discretion, would be granted—and the appellee Graham Motor Company could again sue appellant before the same justice. But, as has been demonstrated in argument I, A, the best interests of appellant are served by obtaining a hearing before a learned judge in a court of record.

Paradoxically appellants position in this regard is analogous to that of the municipality in *Ward, supra*. There it was argued that notwithstanding the possible bias of the mayor-traffic court judge, any unfairness at the trial level could be corrected on appeal and trial *de novo*. ___ U.S. ___, 93 S.Ct. at 83-84. Mr. Justice Brennan,

however, rejected this proposition and stated that the possibility of reversal on appeal does nothing to assure a fair trial below. *Id.* Moreover, the West Virginia Supreme Court in *Williams v. Brannen*, 116 W. Va. 1, 5, 178 S.E.67 (1935); in considering the "curing" of a justice's interest in criminal cases by appeal and trial *de novo*, concluded that appeal was insufficient because "It is ordinarily cheaper to pay a moderate fine than to pay the expenses attendant upon an appeal." *Cf.* 50 W. Va. L. Q. at 122. While these principles may apply here also, appellant believes that he may only obtain a fair trial before a *learned* judge, and thus the only viable avenue of attack for him is to exercise his right of appeal in order to be heard in a court of record.

II.

THE INTERESTS OF THE APPELLANT IN REVIEW OF THE JUDGMENT OF A JUSTICE OF THE PEACE IS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Nature of the Appeal Bond Requires Access to a Court of Record for the Appellant

The bond appellant faces may be posted in three ways: (1) cash of $600, (2) a property bond of $600, or (3) a commercial surety bond at a cost to appellant of approximately six percent. Choice (2), the property bond, presupposes that the appellant has property of that value, but the facts have shown that appellant is indigent. The second choice also presupposes that appellant is able to prevail upon a non-indigent friend or relative to undertake such a risk for him. And indeed it is a risk:

Code 45-1-4 provides that one liable as a surety on a judgment shall pay on motion of the obligee the amount awarded, *plus* five percent damages, and interest. Moreover, in West Virginia a paid judgment cannot be enforced against the appellant by his surety under the subrogation rights provided by the statute. *Greenbrier Valley Bank v. Holt*, 114 W. Va. 363, 171 S.E. 906 (1933). Thus the state law provides a considerable deterrent to appellants exercise of this option.

This monetary risk of a surety on appeal is assumed by a professional bondsman in choice (3) because he charges a nonrefundable premium. Such a loss of funds, the premium, in order to obtain the fair tribunal that appellant believes he is entitled to, was found by one court to be a taking of property without due process of law under the *Sniadach* rationale. *Brooks v. Small Claims Court*, 105 Cal. Rptr. 785, 789, ____ P.2d ____, 41 U.S.L.W. 2391 (1973). Similarly, choice (1), cash, would also cause appellant to lose the beneficial use of his property pending a hearing before a learned and unbiased judge. Thus the effect of the bond upon appellant is clear: he must suffer a loss of his property pending a fair hearing in a fair tribunal. Appellant contends that considering the effect of the bond upon appellant and the function of the bond under state law, the means employed under the challenged statute do not justify the end.

The function of the appeal bond in the West Virginia Justice of the Peace System is to provide "security which the statute substitutes in place of the advantage which the plaintiff gains by the judgment. It is because of this security that the judgment is vacated," *Chewning v. Tomlinson*, 105 W. Va. 76, 78, 141 S.E. 532 (1928). Thus counsel for appellee is simply incorrect in his suggestion that in West Virginia the bond is not a

substitute for the judgment gained by Graham Motor Company (Motion to Dismiss at 7); and appellee was further incorrect by suggesting that the bond is to safeguard a judgment to which the plaintiff is rightfully entitled (*Id.* at 12). The plaintiff has no proprietary right in his judgment; he is not entitled to his judgment because it has been found that in any civil action the defendant may appeal

> without any bill of exceptions or certificate of evidence, without any manifestation of error of law on the record, simply an appeal as of right, without any assignment of error or showing of error, which appeal of its own force nullifies the verdict and judgment and opens the case for trial de novo upon both law and fact . . . . *Richmond, supra*, 48 W. Va. at 405.

The function of the bond then is not just to indemnify the victor from further trouble upon appeal and to secure him from loss, but to provide the appellant with access to a court of record for a final determination of the issues involved. Thus a single bond, designed to cover the "advantage" which the plaintiff gains by his judgment as employed in the District of Columbia and approved by this Court in *Hof*, would suffice.

B. Because Appellant Has Been Denied A Fair and Adequate Trial Due Process Will Strike at Any Impediment to A Hearing Appropriate to the Nature of Appellant's Case.

Appellant has attempted to demonstrate in the foregoing sections of his argument that there are strong reasons for appellate review in the West Virginia justice of the peace system. First, there is a state constitutional right of review which arises in part because of the lay

judge status of a justice. Second, the lack of expertise in matters of law may cause a party asserting sophisticated legal arguments to suffer because the justice fails to recognize a valid defense. And third, because of a statutory method of compensating justices, the lay judge has some degree of prejudice against the defendant in civil matters. These last two defects, which create a reasonable possibility of error, in and of themselves work a denial of due process.

In the oft cited and quoted opinion of Mr. Justice Black in *In re Murchinson*, 349 U.S. 133 (1955), it was said that:

> A fair trail in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness . . . [T]o perform its high function in the best way "justice must satisfy the appearance of justice." [Citations omitted, emphasis supplied in *Estes v. Texas*, 381 U.S. 532, 543, (1965).]

This principle of absolute fairness in the judicial system has been used again and again to strike down prejudicial procedures. Mr. Justice Clark summarized many of these cases in *Estes v. Texas, supra*, wherein a conviction in a widely televised and highly sensational criminal trial was reversed because of the prejudice attendant to the publicity. There he quoted Justice Taft in *Tumey v. Ohio, supra*, that "possible temptations" that may result in partiality constitute a denial of due process. 381 U.S. at 543. And this rule, he noted further, was applied in *Turner v. State of Louisiana*, 379 U.S. 466 (1963); *Rideau v. State of Louisiana*, 373 U.S. 723 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963), and

White v. Maryland, 373 U.S. 59 (1963). In each of these cases "the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it." *Id.*

More recently in *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971), Mr. Justice Douglas, giving the opinion of a unanimous Court, found that a judge who was the subject of highly personal aspersions giving rise to contempt charges had become so embroided as to make him unfit to sit in judgment. 400 U.S. at 465. The principle, as Mr. Justice Burger implied in his concurring opinion, is that "In every trial there is more of stake than just the interests of the accused; the integrity of the process" . . . is also at stake. 400 U.S. at 468. Thus any inherent defect which creates even the possibility of error is a *per se* violation of due process of law.

The imperfect conditions in the justice of peace system coupled with the absolute state right of review constitute a fundamental interest in the appellant to access to a court of record. However, before he may obtain the plenary hearing in a court of record to which he is entitled, appellant must satisfy the challenged appeal bond. *Staats v. McCarthy*, 130 W. Va. 240, 43 S.E.2d 826 (1947); *Worley v. Easley*, 123 W. Va. 1, 13 S.E.2d 158 (1941); *Wilfong v. Jackson*, 120 W. Va. 328, 198 S.E. 134 (1938); *Powell v. Miller*, 41 W. Va. 371, 23 S.E. 577 (1895).

Access to the courts as grounded in the due process clauses of the Fourteenth and Fifth Amendments has been the subject of considerable discussion in this Court since *Boddie v. Connecticut*, 401 U.S. 391 (1971). See *Ortwein v. Schwab*, ___ U.S. ___, 93 S.Ct. 1172 (1973); *U.S. v. Kraus*, ___ U.S. ___, 93 S.Ct. 631

(1973); *Huffman v. Boerson*, 406 U.S. 337 (1972); *Frederick v. Schwartz*, 402 U.S. 937 (1971); *Meltzer v. LeCraw*, 402 U.S. 654 (1971); *Beverly v. Scotland Urban Enterprises*, 402 U.S. 955 (1971). In *Boddie* Mr. Justice Harlan, writing for the court, stressed the state's monopoly over the means for legally dissolving a marriage, and since "a meaningful opportunity to be heard" was firmly imbedded in our due process jurisprudence, Connecticut's refusal to admit good-faith divorce plaintiffs to her courts was a denial of the opportunity to be heard and a denial of due process. 401 U.S. at 377.

Subsequently in the *Kras* opinion, delivered by Mr. Justice Blackmun, it was pointed out that *Boddie* did not mean that access for all individuals to the courts is a right guaranteed by due process in all circumstances. ____ U.S. ____ , 93 S.Ct. at 636. The test, as suggested by *Kras* and *Ortwein*, is whether (1) the litigant's interest is fundamental, (2) resort to the courts is the sole path of relief, and (3) governmental control over the relief is exclusive. Appellant's case satisfies all of these requirements.

(1) As set forth earlier, appellant's right to a hearing in a court of record rises to constitutional significance because (a) the state provides an absolute right of review as part and parcel of the entire process; (b) an inherent defect in the system causes the judge to biased; (c) the judge has no expertise in matters of law which may be before him (as opposed to administrative expertise as in *Ortwein*[4]) Thus at best appellant receives only token access to the courts. Cf. *Ortwein*, ____ U.S. ____, 93

[4]Generally this Court has found that administrative agencies have specialized understanding in their respective fields. Davis, *Administrative Law*, Exhaustion, §20.03; *E.g. Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972) reh den. 405 U.S. 948.

S.Ct. at 1176 (Douglas, J., Dissenting), and only a semblance of equal treatment before the courts. See *Chambers v. Baltimore & Ohio Ry.*, 207 U.S. 142, 148; *Barbier v. Connolly*, 113 U.S. 27, 31 (1884); *Gulf v. Colorado & Sante Fe Ry. v. Ellis*, 165 U.S. 150 (1897); *Truax v. Corrigan*, 257 U.S. 312 (1921) (the fundamental interest in equal treatment before the courts).

(2) The facts demonstrate that appellant sought to resolve his dispute with his creditor by repudiating the contract, but for appellee this solution was not satisfactory and suit was filed. Thus Mr. Justice Harlan's statement obtains.

> Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum. *Boddie* at 376-377. Quoted with approval in *Kras*, ____ U.S.____ , 93 S.Ct. at 637. Cf. *Boddie* at 387 (Brennan J. concurring in part).

(3) Like *Boddie*, and unlike *Kras*, 93 S.Ct. at 638, appellant has no alternative but to submit the underlying controversy to West Virginia's legal system. He may not negotiate reasonably with his opponent because he has no bargaining position; the creditor knows that "J.P." in West Virginia means "judgment for the plaintiff," 48 W. Va. L. R. at 243, and therefore there is no reason for Graham Motors to compromise with appellant. And it should be noted that it was Graham Motors that choose the legal system wherein the controversy would be

settled: courts not of record as opposed to courts of record. Both systems of trial courts had concurrent jurisdiction in this matter. See *Richmond v. Henderson, supra*, 48 W. Va. at 401.

Appellant submits that there is no countervailing governmental interest that overrides appellant's interest in access to the court. Counsel for appellee has suggested in their motion to dismiss that the purpose of the bond is to protect the plaintiff when "there is no merit in the appeal". (Motion p. 7). But the West Virginia Supreme Court has said that there need not be any merit to appellants appeal: there need not be ". . . any manifestation of error of law or the record, simply an appeal as of right, without any assignment of error of showing of error. . ." *Richmond* at 405. If the challenged statute has the winnowing effect appellee suggests it should, this flies in the face of the underlying reasons for the appeal, and there can be no justification for having any bond at all.

III.

SINCE THE STATUTORY DOUBLE APPEAL BOND REQUIREMENT INFRINGES UPON APPELLANT'S INTERESTS IN ACCESS TO THE COURTS AND CANNOT BE JUSTIFIED BY EITHER A RATIONAL OR A COMPELLING STATE INTEREST, IT THEREFORE CONTRAVENES APPELLANT'S CONSTITUTIONAL GUARANTEE TO EQUAL PROTECTION OF THE LAWS.

The statutory appeal bond provisions challenged herein create two classes of civil litigants depending upon their initial judicial forum. Chapter 50, Article 15, Section 2 of the West Virginia Code would impose a double appeal bond requirement on those civil litigants who wish to appeal a justice of the peace court decision. *Staats v.*

McCarty, supra, while Chapter 58, Article 4, Section 13 of the Code provides that to appeal from a court of record a party need only post an appeal bond "in a penalty to be fixed by the court or judge." As a practical matter the appeal bond under the latter statutory provision is generally set at the amount of the judgment. See generally *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949); *Gaines v. Hawkes*, 153 W. Va. 471, 170 S.E.2d 676 (1969). The more rigorous double appeal bond requirement works a particular hardship on the poor individual who seeks to appeal from a justice of the peace court because he may be unable to post the higher bond and is thus unable to secure access to a court of record.

In West Virginia in actions to recover money the plaintiff has a choice of initial forums since justice of the peace courts and circuit courts have concurrent jurisdiction in matters involving less than three hundred dollars. West Virginia Code 50-2-1; 51-2-2.

> It will be asked, why should A suing in a circuit court upon a promissory note for three hundred dollars have a jury, whereas B suing on a like note before a justice not have a jury. The answer is B has chosen a forum of a different nature from the circuit court. *Richmond v. Henderson, supra*, 48 W. Va. at 401.

Because appellant's creditor chose to sue him before a justice of the peace, he was faced with the more onerous double appeal bond requirement before he could appeal the adverse decision to a court of record. Whereas, had appellant's creditor chosen to sue him in a court of record, he only would have been faced with a bond of approximately half the amount of the challenged bond in order to appeal his case. Cf. *Gaines v. Hawkes, supra*. The

difference in the initial forum—a matter of choice for the plaintiff-creditor—is that the appellant, who is poor, may not have the opportunity to appear in a court of record and have his defenses determined by an unbiased and learned judge because of the appeal bond.

Under the Equal Protection Clause the constitutional validity of these classifications depend upon whether the classification is reasonably related to a legitimate state interest or, alternatively, if a fundamental interest is involved, whether the classification can be justified by a compelling state interest. Where statutory classifications exist, this court has generally inquired whether the challenged classification is reasonably related to a legitimate state purpose. *McGowan v. Maryland*, 366 U.S. 420 (1961); *McDonald v. Board of Education*, 394 U.S. 802 (1969). This doctrine was succinctly set forth in *James v. Union Guano Co.*, 264 U.S. 171 (1924) by Mr. Justice Butler:

> The Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of the distinction if real, and the condition imposed has a reasonable relation to a legitimate object. 264 U.S. at 181.

However, where the challenged classification has touched upon an individual's fundamental interests, this Court has applied a stricter standard and required a showing of a compelling state interest in order to justify the statutory distinctions. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Kramer v. Union Free School District*, 395 U.S. 621 (1969). The appellant contends that the more stringent compelling state interest test is applicable here since the challenged appeal bond infringes the appellant's right of access to the courts.